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IN THE

# Supreme Court of the United States

BAKER BOTTS L.L.P. AND JORDAN, HYDEN, WOMBLE, CULBRETH & HOLZER, P.C.,
*Petitioners,*

v.

ASARCO LLC,
*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

## REPLY FOR PETITIONERS

EVAN A. YOUNG
BAKER BOTTS L.L.P.
98 San Jacinto Blvd.
Austin, Texas 78701
(512) 322-2506

OMAR J. ALANIZ
BAKER BOTTS L.L.P.
2001 Ross Ave.
Dallas, Texas 75201
(214) 953-6593

G. IRVIN TERRELL
AARON M. STREETT
*Counsel Of Record*
MICHELLE S. STRATTON
SHANE PENNINGTON
BAKER BOTTS L.L.P.
910 Louisiana St.
Houston, Texas 77002
(713) 229-1234
aaron.streett@bakerbotts.com

WM. BRADFORD REYNOLDS
BAKER BOTTS L.L.P.
1299 Pennsylvania Ave., N.W.
Washington, D.C. 20004-2400
(202) 639-7700

*Counsel for Petitioner Baker Botts L.L.P.*

*(Additional Counsel Listed On Inside Cover)*

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

SHELBY A. JORDAN
NATHANIEL P. HOLZER
JORDAN, HYDEN, WOMBLE,
CULBRETH & HOLZER, P.C.
500 N. Shoreline Dr., Ste. 900
Corpus Christi, Texas 78401
(361) 884-5678

*Counsel for Petitioner Jordan, Hyden, Womble, Culbreth & Holzer, P.C.*

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## REPLY FOR PETITIONERS

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Two of the busiest bankruptcy circuits are divided over a recurring, purely legal issue. ASARCO's denial of any material split contradicts the opinion below, the relevant Ninth Circuit opinions, and its own lower-court briefing. ASARCO's dismissal of the issue's importance likewise contravenes the opinion below and industry *amici*'s informed views. No one disputes that the Fifth Circuit's categorical rejection of fee-defense compensation presents an ideal vehicle. Certiorari is warranted.

### I. THERE IS A MATERIAL SPLIT BETWEEN AT LEAST TWO BANKRUPTCY-HEAVY CIRCUITS

The opinion below candidly acknowledged that the Fifth and Ninth Circuits are now divided over whether § 330 grants bankruptcy courts discretion to award com-

pensation for successfully defending fee applications. Pet. App. 15a-16a. ASARCO concedes that those courts "read § 330 differently," but contends they have not created "a conflict that matters." BIO 9, 10. Why? Because (according to ASARCO) both circuits would award compensation for defending against "frivolous" objections to a fee application, and neither would grant compensation for defending against non-frivolous objections.

1. Merely reading the decisions refutes this jurisprudential revisionism. Courts always have "inherent" power to award fees for defending against frivolous or bad-faith litigation, as an "exceptio[n]" to the American Rule. *Chambers* v. *NASCO, Inc.*, 501 U.S. 32, 45-46 (1991); Fed. R. Civ. P. 11; Fed. R. Bankr. P. 9011. But this rarely invoked truism is irrelevant to whether bankruptcy courts have discretion *under § 330* to award fees in the far more common scenario of successfully defending against *non-frivolous* objections. *That* is the important, recurring question that divides the circuits.[1]

2. ASARCO finds no material split on that point because certain objections in *In re Smith*, 317 F.3d 918 (9th Cir. 2002), were denoted "frivolous." ASARCO uses the Ninth Circuit's fleeting characterization of those objections to misrepresent that the Ninth Circuit—like the Fifth—denies bankruptcy courts discretion to award fees under § 330 for successfully defending against *non-frivolous* objections. In fact, the courts could not be farther apart on this issue. The Fifth Circuit repudiated every aspect of the Ninth Circuit's interpretation of § 330. See Pet. 18-19. And the Ninth Circuit's careful

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[1] Petitioners had no reason to argue that ASARCO's wholly meritless objections met the stringent bad-faith test. See BIO 11-12. Nearly every court awarded fees for successfully defending fee applications, see Pet. 21-22, and ASARCO's counsel initially conceded that § 330 authorizes defense fees. Pet. App. 135a.

statutory analysis turned not on the frivolity of certain objections in that case, but on the recognition that

- fee-application defense benefits the estate and is necessary to close a case;
- defense fees are essential to preventing dilution of bankruptcy compensation;
- denying defense fees would incentivize meritless objections; and
- cases interpreting fee-shifting statutes authorize defense-fee compensation to avoid dilution.

See *ibid.*; *Smith*, 317 F.3d at 928-929.

The *Smith* court's *holding* was clear: To obtain defense fees, "the fee applicant must demonstrate that the services for which compensation is sought satisfy the requirements of section 330(a)(4)(A) *and* that its case exemplifies a 'set of circumstances' where the time and expense incurred by the litigation is 'necessary' within the meaning of section 330(a)(1)." 317 F.3d at 928. Far from restricting defense fees to the narrow realm of sanctions for frivolous objections, *Smith* emphasized that they are "largely a matter within the informed discretion of the bankruptcy court." *Id.* at 929. This holding reaffirmed the Ninth Circuit's § 330 precedents. See Pet. 15-19. *Smith*'s extended analysis of § 330 and those precedents would have been unnecessary if compensability turned on certain objections' frivolousness. See 317 F.3d at 929 (mentioning frivolousness only to support policy argument that denying defense fees would "encourage debtors to file meritless objections to fee applications").

Indeed, ASARCO's re-imagining of *Smith* fails even on its own terms. For *Smith* affirmed two law firms' defense-fee awards, only the first of which involved frivolous objections. See 317 F.3d at 922, 928-929. The court affirmed the second award "[f]or the same reasons discussed in connection with [the first firm]," even though

the second firm's fee defense was only "mostly successful." *Id.* at 929. ASARCO's crucial assertion that the Ninth Circuit "made no holding about whether fees could be awarded under § 330 in the absence of [frivolousness]" is thus doubly mistaken. See BIO 9; *id.* at 1, 15.[2]

The Fifth Circuit knew precisely what *Smith* "ultimately held": "[Defense-fee] compensation rests within the bankruptcy court's discretion to award fees for 'reasonable and necessary work.'" Pet. App. 16a (quoting 317 F.3d at 929). It simply disagreed, categorically concluding that "Section 330(a) does not authorize compensation for the costs counsel or professionals bear to defend their fee applications." *Id.* at 14a. The split could not be starker.

3. Finally, ASARCO asserts that the Ninth Circuit might have denied defense fees here because "ASARCO's objections resulted in a meaningful reduction of the fees that petitioners were seeking." BIO 12 (citing *In re Riverside-Linden Inv. Co.*, 945 F.2d 320, 322-323 (9th Cir. 1991)). ASARCO omitted this argument below for good reason: the "meaningful reduction" it cites is Baker Botts' "agree[ment] voluntarily to credit" about $132,000 to the estate for certain time entries and expenses—roughly *one-tenth of 1%* of Baker Botts' core fees. Pet. App. 145a. In *Riverside-Linden*, by contrast, the Ninth Circuit affirmed the denial of defense fees because the fee application was "meritless" and "filed merely to get litigation fees." *Smith*, 317 F.3d at 928, 929 (recounting *Riverside-Linden*). Here, after Baker Botts

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[2] The Ninth Circuit confirmed its approach in *In re Wind N' Wave*, recounting *Smith*'s § 330 analysis at length—without mentioning objections' frivolousness. 509 F.3d 938, 943 (2007). The court then applied "the *Smith* standard" to a "nearly identical" Code provision and awarded creditors defense fees without finding the defeated objections frivolous. *Id.* at 944, 946. ASARCO's dismissal of *Wind N' Wave* as addressing a different statute (BIO 17 n.6) again fails to take the Ninth Circuit at its word.

took *de minimis* deductions and litigated ASARCO's challenges to the remaining 99.9% of its fees, the court rejected *all* of ASARCO's objections.[3] The Ninth Circuit plainly would have affirmed the discretionary defense-fee award on these facts. See *id.* at 929 (affirming awards where objections were all or "mostly" rejected).

4. ASARCO was more honest about *Smith* in its briefing below. It never contended that it could prevail under *Smith* because its objections were non-frivolous or caused "meaningful reduction[s]." Instead, ASARCO recognized that *Smith* doomed its appeal, so it urged the Fifth Circuit to reject *Smith* as "wrongly decided" and "inconsistent with [opinions] that denied fees for defending a fee application." 5th Cir. Reply Br. 22, 26 (filed Mar. 8, 2013). Having per-

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[3] ASARCO's claim that this statement is "inaccurate" (BIO 3) is puzzling, for it comes directly from *the Fifth Circuit's* observation that "the bankruptcy court rejected all of ASARCO's objections to the core fee request." Pet. App. 3a. ASARCO similarly disputes the petition's statement that ASARCO did not challenge the amount of defense fees, asserting that the bankruptcy court found petitioners' initial request "higher than [was] reasonable and necessary." BIO 3-4 (quoting Pet. App. 142a), 5 n.1. In context, the petition's point was clear: this case presents a clean vehicle because *at the court of appeals* ASARCO did not challenge the amount of defense fees awarded below; it asserted only—and the Fifth Circuit agreed—that defense fees are barred as a matter of law. ASARCO seems to be referencing the bankruptcy court's reduction of Baker Botts' requested core-fee *enhancement* and the lower courts' denial of fees for pursuing the enhancement. BIO 3, 4. The latter ruling is what caused the reduction from the $8 million requested to the $5 million awarded for defense fees. See Pet. App. 148a-149a, 160a-161a, 165a. But ASARCO's "success" on those issues is irrelevant; Baker Botts seeks fees only for successfully defending its *core-fee* application—not pursuing the enhancement—and that is the issue dividing the circuits. See Pet. App. 4a & n.3 (noting that "Baker Botts did not appeal [the] ruling" denying fees for "pursuit of its fee enhancement" and that the lower courts found that the entire $5 million defense-fee award "compensated Baker Botts for defending core fees").

suaded the Fifth Circuit, ASARCO cannot now credibly claim that the split makes no difference on these facts.

## II. The Issue Is Important And Warrants Immediate Review

1. ASARCO does not dispute that this Court commonly resolves 1-1 or 2-1 splits involving bankruptcy-heavy circuits. See, *e.g.*, *Clark* v. *Rameker*, 134 S. Ct. 2242, 2246 (2014) (1-1 split between Fifth and Seventh Circuits); *Radlax Gateway Hotel, LLC* v. *Amalgamated Bank*, 132 S. Ct. 2065 (2012) (petition and BIO debate 1-1 or 2-1 split involving Fifth Circuit); *Hall* v. *United States*, 132 S. Ct. 1882, 1886 & n. 1 (2012) (1-1 split between Eighth and Ninth Circuit when granted; Tenth Circuit ruled post-grant). That practice honors the Constitution's call for "uniform laws on the subject of Bankruptcies throughout the United States," Art. I, § 8, cl. 4. And it reflects that "the current appellate structure of the bankruptcy system" results in "relatively few bankruptcy appeals mak[ing] their way up to the circuit courts." Pardo & Watts, The Structural Exceptionalism of Bankruptcy Administration, 60 UCLA L. Rev. 384, 438-439 (2012); see Florida *Amicus* Br. 17. ASARCO's claim that this issue reaches the circuit level only once a decade makes review *more* urgent to avoid consigning the bankruptcy system to disarray for another decade or more.[4]

2. Further "percolation" would only deepen an entrenched split and delay resolution of an issue routinely affecting bankruptcies. There is no prospect that *Lamie* v.

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[4] ASARCO perceives no harm to the bankruptcy system in the "numerous" courts that deny defense fees. BIO 17, 24. But only two bankruptcy courts consistently do so, see Pet. 22; the Fifth Circuit ruled only months ago; and lower courts in the Eleventh Circuit frequently award defense fees. See Florida *Amicus* Br. 12-13. Practitioner *amici*, moreover, detail the damage that would ensue if the decision below stands. *Id.* at 15-18; Texas *Amicus* Br. 13-18.

*U.S. Trustee*, 540 U.S. 526 (2004)—a case having nothing to do with defense fees—will cause the Ninth Circuit to abandon its established view.[5] ASARCO's interpretation of *Lamie* (BIO 15-16) is so implausible that it did not raise it until its Fifth Circuit reply brief; the opinion below ignored it; and no post-*Lamie* court addressing defense fees has even mentioned it.

ASARCO emphasizes that the Second and Third Circuits have not yet weighed in, asserting that the Southern District of New York and the District of Delaware attract mega-bankruptcies that are supposedly likeliest to have defense-fee litigation. BIO 15 & n.4. But courts in those districts routinely award defense fees, including the influential decision by now-Third Circuit Judge Jordan in *In re Worldwide Direct Inc.*, 334 B.R. 108 (D. Del. 2005). See Pet. App. 167a-169a. And, in fact, over 85% of reported decisions litigating defense fees arise *outside of* those districts. See *id.* at 167a-171a.

3. ASARCO's claim that the question presented is unimportant (BIO 16-18) strains credulity. The Fifth Circuit certainly saw its importance: "The issues presented transcend debtor's counsel, because Section 330(a) governs compensation of all professionals whose fees are paid by the bankruptcy estate." Pet. App. 14a. The court understood that all such professionals *must* file a detailed fee application and respond to any objections. *Id.* at 15a. Allowing geography to dictate the ground rules for something so fundamental invites chaos. See Texas *Amicus* Br. 13-20; Florida *Amicus* Br. 14-20.

ASARCO nonetheless argues that *since 1978* only three circuits and "only 57 reported cases" from lower courts have addressed defense-fee compensability. BIO 16-17.

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[5] Under *Lamie*, counsel cannot seek § 330 compensation for services rendered to the debtor after a trustee is appointed. 540 U.S. at 529, 538-539. No appointment occurred here.

The opportunistic use of 1978 as a starting point overlooks that the *1994* Amendments clarified that professionals may be compensated for services "necessary for the administration of, or beneficial * * * toward the completion of * * * a case." See Pet. 14-15 (discussing amended § 330(a)(3)(C)). Defense fees were contested in eight reported cases between 1994 and 2005 (with compensability affirmed in seven). The issue began arising more often after *In re Teraforce Technology Corp.* categorically denied defense fees. 347 B.R. 838, 867 (Bankr. N.D. Tex. 2006). Since then, the issue has arisen 27 times in reported opinions. If tallying reported decisions reveals importance, the issue has arisen with impressive and increasing frequency in recent years. And fee litigation will only grow now that the Fifth Circuit has granted a risk-free license to objectors. See Texas *Amicus* Br. 17; Florida *Amicus* Br. 17.[6]

Comparing only reported decisions to all bankruptcies filed, ASARCO declares that fee litigation recurs in an "infinitesimally small percentage" of cases. BIO 17-18. In fact, "the fees of estate professionals are frequently litigated." Texas *Amicus* Br. 17 n.18. The leading study found objections to fees in 10% of all (and 20% of large) Chapter 11 bankruptcies. *Ibid.* That amounts to *over 900* cases annually. None of ASARCO's importance-diminishing gambits can succeed.[7]

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[6] ASARCO again contradicts unappealed findings by faulting Baker Botts' "cho[ic]e" to use 191 timekeepers, denying that its onslaught "forced" extensive fee-defense efforts. Compare BIO 1, 18 n.8, with Pet. App. 142a (finding "unusual circumstances" that "forced [Baker Botts] to respond to Reorganized ASARCO's challenges"). Most timekeepers expended a few hours to respond to ASARCO's "meritless [time-entry] objection," Pet. App. 150a, and demand for "every document" created during the bankruptcy, *id.* at 3a. See Pet. 8-9.

[7] ASARCO's statistical creativity is particularly misleading here, because defense-fee disputes are typically resolved in orders available only on PACER. See Texas *Amicus* Br. 17 n.18; Florida *Amicus*

## III. The Judgment Below Is Wrong

1. ASARCO's merits argument hinges on the view that a statute must specifically single out *defense fees* for compensation to overcome the American Rule. But this Court and others consistently interpret statutes that authorize "reasonable attorney fees" (or the like) to include discretion to award defense fees. This Court unanimously awarded "fees for the fee litigation" under the Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(A), which provides simply for "fees * * * incurred by [the prevailing] party in any civil action" against the United States. *Commissioner, INS* v. *Jean*, 496 U.S. 154, 157 (1990). The Court cited cases holding that "denying attorneys' fees for time spent in obtaining them would dilute the value of a fees award by forcing attorneys into extensive uncompensated litigation in order to gain any fees." *Id.* at 162 (citation omitted). The circuits agree. *E.g.*, *Wind N' Wave*, 509 F.3d at 942 ("Along with other circuits, we have granted compensation for litigation over a fee award under fee shifting statutes even when those statutes did not expressly allow for it.") (collecting cases); *Hernandez* v. *Kalinowski*, 146 F.3d 196, 199 (3d Cir. 1998) ("Although the phrase 'fees on fees' appears nowhere in [the PLRA], * * * the key is determining if 'fees on fees' are included within the meaning of fees 'directly and reasonably incurred in proving an actual violation of the plaintiff's rights.'").

Section 330(a)(1)(A)'s provision of "reasonable compensation for actual, necessary services" likewise displaces the American Rule and authorizes discretion to award defense fees, as necessary to avoid core-fee dilution. Moreover, as the Fifth Circuit acknowledged, the Code compensates services that "are likely to benefit a debtor's estate *or are necessary to case administration.*"

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Br. 12 & n.4.

Pet. App. 15a (emphasis added); see §§ 330(a)(3)(C), 330(a)(4)(A)(ii). ASARCO—like the court below—never explains why successfully defending fee applications lies outside this express provision. Section 330(a), therefore, contains *more* "explicit statutory guidance" regarding defense fees than other fee-shifting statutes and is equally in "express derogation" of the American Rule. Contra BIO 24 n.9 (quoting Pet. App. 17a-18a).[8]

2. ASARCO discounts as mere "policy" (BIO 24) § 330(a)(3)(F)'s textual mandate that bankruptcy practitioners be compensated equally with non-bankruptcy counsel. And while ASARCO asserts that "the American Rule applies to fee disputes outside of bankruptcy," BIO 24-25, that does not resolve whether the parity principle requires compensation for fee-application defense. Non-bankruptcy lawyers need not prepare detailed fee applications, seek court approval to be paid, and face objections from non-clients. Forcing bankruptcy practitioners to bear the costs of these unique, Code-dictated procedures will inexorably dilute their compensation below that of other counsel. *In re Nucorp Energy, Inc.*, 764 F.2d 655, 659 (9th Cir. 1985).[9] Thus, the Ninth Circuit found the "closest parallel" for parity purposes to be "the time that attorneys spend calculating and justifying their fees in other types of cases in which fees are awarded by the court." *Ibid.* As discussed *supra*, at 9, defense fees are uniformly available in such settings.

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[8] *Key Tronic Corp.* v. *United States* does not support ASARCO's super-clear-statement rule for defense fees; none of the statutory provisions there "expressly mention[ed] the recovery of attorney's fees" at all. 511 U.S. 811, 815 (1994).

[9] The lack of parity is especially striking here: the *client* paid Baker Botts' fees without complaint. A third party that Baker Botts defeated in litigation—Reorganized ASARCO—then challenged those fees. That could not happen outside of bankruptcy; a lawyer whose client willingly pays his fees expends little cost in collecting them.

3. ASARCO draws a negative inference from § 330(a)(6)'s provision that "[a]ny compensation awarded for the preparation of a fee application shall be based on the level and skill reasonably required to prepare the application." But that plain text does not *grant authority* to award fees for preparing the application; it instructs courts *how* to exercise their discretion to award such fees that are otherwise compensable under § 330(a). Consequently, there is no implication that courts lack authority to award fees for defending applications.

This Court rejected a similar argument in *Setser* v. *United States*, 132 S. Ct. 1463 (2012), refusing to draw a negative inference from a provision that was "framed not as a conferral of authority but as a limitation of authority that already exists." *Id.* at 1469. Just so here: Section 330(a)'s broad provisions grant discretion to award defense fees, and § 330(a)(6) "in no way implies a repeal of [this] preexisting authority." *Ibid.* Nor is § 330(a)(6) superfluous under petitioners' view, because its precise limitation is not included elsewhere in § 330(a)(3), and Congress wished to emphasize that "scrivener's skills" (Pet. App. 15a-16a) should involve lower rates than substantive legal work. See Florida *Amicus* Br. 9 (discussing legislative history). After discarding ASARCO's misreading of § 330(a)(6), there is "no textual or logical argument for treating so differently a party's preparation of a fee application and its ensuing efforts to support that same application." *Jean*, 496 U.S. at 162; see Pet. 28-30.[10]

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[10] The Fifth Circuit correctly ignored ASARCO's invocation of "congressional silence." BIO 22. "[F]ailed legislative proposals"—much less isolated testimony to a single committee two years before passage—"are a particularly dangerous ground on which to rest an interpretation * * * because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change." *Cent. Bank of Denver* v. *First Interstate Bank of Denver*, 511 U.S. 164, 187 (1994).

Respectfully submitted.

EVAN A. YOUNG
BAKER BOTTS L.L.P
98 San Jacinto Blvd.
Austin, Texas 78701
(512) 322-2506

OMAR J. ALANIZ
BAKER BOTTS L.L.P.
2001 Ross Ave.
Dallas, Texas 75201
(214) 953-6593

G. IRVIN TERRELL
AARON M. STREETT
*Counsel of Record*
MICHELLE S. STRATTON
SHANE PENNINGTON
BAKER BOTTS L.L.P.
910 Louisiana St.
Houston, Texas 77002
(713) 229-1234
aaron.streett@bakerbotts.com

WM. BRADFORD REYNOLDS
BAKER BOTTS L.L.P.
1299 Pennsylvania Ave., N.W.
Washington, D.C. 20004-2400
(202) 639-7700

*Counsel for Petitioner Baker Botts L.L.P.*

SHELBY A. JORDAN
NATHANIEL P. HOLZER
JORDAN, HYDEN, WOMBLE,
CULBRETH & HOLZER, P.C.
500 N. Shoreline Dr., Ste. 900
Corpus Christi, Texas 78401
(361) 884-5678

*Counsel for Petitioner Jordan, Hyden, Womble, Culbreth & Holzer, P.C.*

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